



# Native American Graves Protection and Repatriation Act

## BACKGROUND:

Native Americans have strong concerns about the desecration of the human remains of their ancestors and the ownership of sensitive cultural items. Indian tribes, Native Alaskan villages and corporations, Native Hawaiian organizations, and Native American individuals have repeatedly requested the return or "repatriation" of human remains and sensitive cultural items. Consequently, representatives of museums, scientific organizations, Indian tribes, and Native Hawaiian organizations discussed how a better understanding of Native American historic and contemporary cultural values could be developed at the national level. Discussions emphasized the importance of always treating human remains and sensitive cultural items with dignity and respect, recognized the need to identify and return these items that are in museum collections, and stressed the important role that museums play in educating the public and in increasing social awareness about prehistory and history. Congressional consideration of these issues resulted in the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) on November 16, 1990. This information brief is intended to assist Department of Energy (DOE) managers in complying with the requirements of NAGPRA, but it does not contain any new departmental policy or guidance.

## STATUTE:

Native American Graves Protection and Repatriation Act of 1990.

## REGULATIONS:

43 Code of Federal Regulations (CFR) part 10: *Native American Graves Protection and Repatriation Regulations*.

## REFERENCES:

### U.S. Department of Energy

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Archaeological Resources Protection Act*. EH-232-0004/0193r. January 1993, revised February 2006.

Office of Congressional and Intergovernmental Affairs (CI). *American Indian and Alaska Native Tribal Government Policy*<sup>1</sup>. January 2006.

Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Consultation with Native Americans*. DOE/EH-41-0019/1204. December 2004.

Office of Environment, Safety and Health (EH). *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*. DOE G 450.1-3. September 22, 2004.

Office of Environment, Safety and Health (EH). *Department of Energy Management of Cultural Resources*. DOE P 141.1. May 2, 2001.

Office of Intergovernmental and Public Accountability (EM-11). *A Guide for DOE Employees Working with Indian Tribal Nations*<sup>2</sup>. December 2000.

Office of Environmental Guidance (EH-232)<sup>3</sup> Memorandum. *Native American Graves Protection and Repatriation Act*. July 1992.

Office of Congressional and Intergovernmental Affairs (CI). DOE Order 1230.2. *American Indian Tribal Policy*.<sup>4</sup> April 4, 1992.

Office of Environmental Guidance (EH-231)<sup>3</sup> Memorandum. *Management of Cultural Resources at Department of Energy Facilities*. February 23, 1990.

<sup>1</sup> This policy is implemented by DOE Order 1230.2. It replaces the 1992 Policy that was Attachment 1 to that Order.

<sup>2</sup> The DOE American Indian Policy included as Appendix 3 in this document is the 1992 Policy that has been replaced by the January 2006 Policy referenced above.

<sup>3</sup> Currently known as the Office of Air, Water and Radiation Protection Policy and Guidance (EH-41).

<sup>4</sup> The policy contained in Attachment 1 to this DOE Order was replaced by the *American Indian and Alaska Native Tribal Government Policy* of January 2006. The Order itself is still in effect and implements that policy.

## **REFERENCES (cont.):**

### **U.S. Department of the Interior, National Park Service**

National NAGPRA program web site at: <http://www.cr.nps.gov/nagpra/> (accessed 2/7/2006).

Technical Brief No. 11. *Legal Background of Archaeological Resources Protection*. Carol Carnett. September 1991.

### **National Trust for Historic Preservation**

*Archaeological Resource Protection*. Sherry Hutt, Elwood W. Jones, and Martin E. McAllister. The Preservation Press, National Trust for Historic Preservation. Washington, D.C. 1992.

## **NAGPRA provisions**

NAGPRA establishes a means for Native Americans—including members of Indian tribes, Native Hawaiian organizations, and Native Alaskan villages and corporations—to request the return or “repatriation” of human remains and other sensitive cultural items held by federal agencies, such as DOE, or federally assisted museums or institutions. NAGPRA also contains provisions regarding:

- the intentional excavation and removal,
- inadvertent discovery, and
- illegal trafficking in Native American human remains and sensitive cultural items.

## **Organizations involved in NAGPRA implementation**

The primary participants involved in NAGPRA (Section 2 of NAGPRA and 43 CFR 10.2) include:

- federal agencies, such as DOE;
- all institutions and museums receiving federal funds;
- Indian tribes and tribal officials;
- Alaska Native villages and corporations; and
- Native Hawaiian organizations.

## **Items protected by NAGPRA**

Human remains and sensitive cultural items protected under NAGPRA are defined in 43 CFR 10.2(d) as follows:

- human remains: “the physical remains of the body of a person of Native American ancestry.”

- funerary objects: “items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains.”
- associated funerary objects: “those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.”
- unassociated funerary objects: “funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or federal agency.”
- sacred objects: “items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.”
- objects of cultural patrimony: “items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member.”

## **Cultural affiliation**

Cultural affiliation, a key concept for implementing this statute, is defined as “a relationship of shared group identity which can reasonably be traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” (43 CFR 10.2[e])

## DOE's responsibilities under NAGPRA

All federal agencies that manage land and/or are responsible for archaeological collections from their lands or generated by their activities must comply with NAGPRA. Thus, DOE is responsible for the inventory, summary, and potential disposition of cultural items recovered from lands under its jurisdiction, even though the items are held in non-federal repositories. DOE is specifically responsible for:

- producing inventories and written summaries of cultural items in its collections or that it controls;
- informing lineal descendants, Indian tribes, and Native Hawaiian organizations that may be affiliated with these items;
- working with Native American groups identified during the summary and inventory processes; and
- consulting with tribes or Native Hawaiian organizations when planned archaeological excavations may encounter cultural items or when cultural items are inadvertently discovered on federal or tribal lands. (See EH-41 Information Brief, *Consultation with Native Americans*.)

## Returning human remains and sensitive cultural items

The regulations implementing repatriation (43 CFR 10.10) require DOE to expeditiously return *human remains and associated funerary objects* if requested by the lineal descendants or affiliated Indian tribe or Native Hawaiian organization. Repatriation is required when either of these two conditions is met:

- the cultural affiliation of the material with the requesting party has been established by the museum or DOE following the procedures outlined in 43 CFR 10.9 and 10.14

**OR**

- cultural affiliation has been shown by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization to be with that party.

Exceptions to the repatriation requirements are detailed in 43 CFR 10.10(c). For example, if research essential to the national interest is being conducted on such materials, return can be delayed until 90 days after the research has been completed.

DOE is also required to repatriate *unassociated funerary objects, sacred objects, and objects of cul-*

*tural patrimony* to the requesting lineal descendant, Indian tribe, or Native Hawaiian organization if *all* the following criteria (43 CFR 10.10[a][1]) are met:

- the objects conform to the definitions of unassociated funerary object, sacred object, or object of cultural patrimony in 43 CFR 10.2;
- cultural affiliation of the object is established as described in 43 CFR 10.10(a)(1)(ii);
- evidence presented by the requesting party supports a finding that DOE did not have the right of possession to such object unless DOE can prove otherwise (43 CFR 10.10[a][2]); and
- none of the specific exceptions listed in 43 CFR 10.10(c) apply.

Once these issues are satisfied, DOE must return the object if it agrees both that the object is properly classified and that DOE does not have right of possession. If DOE disagrees with the claimant regarding the classification of the object as a cultural item under NAGPRA or has evidence that conveys to DOE the right of possession, no return is required. Disputes between DOE and a party requesting repatriation can be resolved with the help of the Review Committee established under NAGPRA or in federal court. (See *Resolutions of disputes*, below.)

## Native American custody of cultural items excavated or discovered after enactment of NAGPRA

Section 3 of NAGPRA and 43 CFR 10.6 address how to establish Native American custody of cultural items obtained during planned excavations or unanticipated discoveries that occur on federal or tribal lands after November 16, 1990, the date on which NAGPRA was enacted. Following the procedures in 43 CFR 10.6, custody will be determined by the following priority order: lineal descendants, tribal landowners, culturally affiliated Indian tribes and Native Hawaiian organizations, and descendants of the area's aboriginal occupants.

## Intentional archaeological excavations on federal or tribal lands

DOE is permitted to intentionally excavate human remains and sensitive cultural items from federal or tribal lands only if:

- the excavation follows the requirements of the Archaeological Resources Protection Act (ARPA) (see EH-41 information brief on ARPA);

- the objects are excavated after consultation with or, if the excavation is on tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization;
- the disposition of the objects is consistent with their custody (43 CFR 10.6); and
- proof of the consultation or consent is shown to the official responsible for the issuance of the required ARPA permit.

Procedures to be followed by DOE for the intentional excavation of objects protected under NAGPRA are detailed in 43 CFR 10.3.

### **Inadvertent discoveries on federal and Indian lands**

Ground-disturbing activities on DOE or tribal lands can result in the inadvertent discovery of Native American human remains and sensitive cultural objects. When such inadvertent discoveries are made, Section 3(d) of NAGPRA and 43 CFR 10.4 require that:

- activity in the area of the discovery immediately stop;
- a reasonable effort be made to protect the items discovered;
- notice of the discovery be given to the Secretary of Energy or, if the discovery is on tribal land, the appropriate Indian tribe or Native Hawaiian organization;
- consultation on the discovery be initiated following the provisions in 43 CFR 10.5; and
- ground-disturbing activities in the area of the discovery not resume for 30 days following official certification that notification of the accidental discovery has been received by the Secretary of Energy or the tribe.

This provision provides Indian tribes and Native Hawaiian organizations an opportunity to safeguard human remains and sensitive cultural objects and to make a determination as to their appropriate disposition.

### **Resolution of disputes**

A Review Committee is established by Section 8 of NAGPRA to make recommendations to the Secretary of the Interior. The seven-member Committee is appointed by the Secretary of the Interior, as described in Section 8(b) of NAGPRA, and may assist in the following activities:

- monitoring the inventory and identification process and repatriation activities,
- resolving disputes relating to the return of items,
- compiling an inventory of culturally unidentifiable human remains in the possession or control of each federal agency and museum, and
- recommending specific actions for developing a process for disposition of these remains.

All actions of the Review Committee are only advisory and are, thus, not binding on any agency or person.

### **Penalties for non-compliance**

Section 9 of NAGPRA, as implemented by 43 CFR 10.12, authorizes the Secretary of the Interior to assess civil penalties on any museum that fails to comply with the requirements of NAGPRA. Also, individuals who engage in illegal trafficking (e.g., the sale, purchase, use for profit, or transport for sale or profit) of Native American human remains and/or sensitive cultural items shall be fined or imprisoned in accordance with 18 United States Code 1170, which was added by Section 4 of NAGPRA.

Questions of policy or questions requiring policy decisions will not be addressed in EH-41 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Office of Air, Water and Radiation Protection Policy and Guidance, EH-41, (202) 586-9581; fax: (202) 586-3915; e-mail: [Lois.Thompson@eh.doe.gov](mailto:Lois.Thompson@eh.doe.gov).